SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 624.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

Allowed by
E. H. LACOMBE,
United States Circuit Court Judge for the Second Circuit.

3 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify, that the following pages, numbered from 1 to 50, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The United States of America, plaintiff in error, against The New York Central & Hudson River Railroad Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 17th day of February, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

JOHN A. SHIELDS, *Clerk.*

4 (Indorsed:) U. S. Circuit Court, Southern District of New York. The United States of America versus The New York Central & Hudson River Railroad Company. Writ of error. Henry L. Stimson, United States attorney, attorney for U. S. Service of a copy of the within is hereby admitted. New York, January 24, 1908. Albert H. Harris, attorney for defendant. U. S. Circuit Court, Southern District, N. Y. Filed Jan. 25, 1908. John A. Shields, clerk.

5 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the third Wednesday of June, in the year of our Lord one thousand nine hundred and six, and continued by adjournment to and including the tenth day of August in the year of our Lord one thousand nine hundred and six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that at all the times hereinafter mentioned the Missouri Pacific Railway Company was, and still is, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of Missouri, and was a common carrier engaged in the transportation of passengers and property, by and over railroads operated by it, from the city of Poplar Bluff in the State of Missouri to the city of Cairo in the State of Illinois; and that at all the times hereinafter mentioned the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was, and still is, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of Ohio, and was a common carrier engaged in the transportation of passengers and property, by and over railroads operated by it, from the aforesaid city of Cairo to the city of Cleveland in the State of Ohio; and that at all the times hereinafter mentioned the Lake Shore & Michigan Southern Railway Company was, and still is, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of New York, and was a common carrier engaged in the transportation of passengers and property, by and over railroads operated by it, from the aforesaid city of Cleveland in the State of Ohio to the city of Buffalo in the State of New York; and that at all the times hereinafter mentioned the New York Central & Hudson River Railroad Company was, and still is, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of New York, and was a common carrier engaged in the transportation of passengers and property, by and over railroads operated by it, from the aforesaid city of Buffalo in the State of New York to the city of New York in the State of New York; and that at all the times herein mentioned the said Missouri Pacific Railway Company, and the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the said Lake Shore & Michigan Southern Railway Company, and the said New York Central & Hudson River Railroad Company, had established a continuous through line or route operated by the aforesaid common carriers over their respective lines and routes aforesaid, from the said city of Poplar Bluff in the State of Missouri, by way of the Southern District of New York, to the said city of New York in the State of New York; and at all such times the aforesaid common carriers, under a common management, arrangement,
6 and control, handled and transported freight and property for hire from the aforesaid city of Poplar Bluff to the aforesaid city of New York, by and over the aforesaid continuous line and route, and in respect to the transportation of such freight and property for hire over the aforesaid continuous line and route, under such common management, arrangement, and control, were in all respects and at all such times common carriers subject to the provisions of an act of Congress entitled "An act to regulate commerce," approved February fourth in the year of our Lord one thousand eight hundred and

eighty-seven, and the various acts amendatory thereof and supplemental thereto.

That at all the times herein mentioned, the said Missouri Pacific Railway Company and the said Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the said Lake Shore & Michigan Southern Railway Company and the said New York Central & Hudson River Railroad Company, had jointly established and the said Missouri Pacific Railway Company had filed with the Interstate Commerce Commission as required by law, and had published in accordance with the directions of the Interstate Commerce Commission as provided by law, a joint tariff of rates, fares and charges for the transportation of property in interstate commerce, which said joint tariff was in force at all such times upon the aforesaid continuous line and route theretofore established by said common carriers as aforesaid, from the aforesaid city of Poplar Bluff to the aforesaid city of New York. And the said joint tariffs so as aforesaid filed and published by the said Missouri Pacific Railway Company plainly stated the places upon said respective lines and routes of the aforesaid common carriers, between which freight and property would be carried, and contained the classification of freight at such times in force.

That at all the times herein mentioned the rate set forth in said joint tariffs so established, filed and published as aforesaid and in force, from the said city of Poplar Bluff to the said city of New York over the aforesaid continuous line and route theretofore established as aforesaid, upon property of the character, kind and class hereinafter mentioned, to wit, the barrel heads and staves commonly known as cooperage materials, hereinafter mentioned, was thirty-five cents for each one hundred pounds thereof.

That at all the times herein mentioned, one Nathan Guilford was an officer and agent of and a person acting for and employed by the said New York Central & Hudson River Railroad Company, that is to say, traffic manager of said corporation, and as such traffic manager had general charge and control of the freight department of the said corporation.

That at all the times herein mentioned, the Brooklyn Cooperage Company was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that at all the times herein mentioned one Lowell M. Palmer was an officer and agent of and a person acting for and employed by the said Brooklyn Cooperage Company, that is to say, president of said corporation, and as such president had general charge and control and management of the business of said corporation.

That at all the times herein mentioned, the said Brooklyn Cooperage Company was engaged in the cooperage business, and in such business used large quantities of barrel heads and staves of the kind and character herein mentioned, and that large quantities of such barrel heads and staves were manufactured by said Brooklyn Cooperage Company, at the aforesaid city of Poplar Bluff in the State of Missouri, and that after the same were so manufactured as aforesaid,

the said Brooklyn Cooperage Company caused and procured the same to be transported for it by various common carriers over their lines leading out of the aforesaid city of Poplar Bluff, including the aforesaid continuous line and route theretofore established as aforesaid by the aforesaid Missouri Pacific Railway Company and its afore-
7 said connecting common carriers, from the said city of Poplar Bluff to the said city of New York.

That in the month of January in the year of our Lord one thousand eight hundred and ninety-eight (the exact date being to the jurors unknown), the aforesaid Lowell M. Palmer, who was then and there and at all the times herein mentioned acting for and on behalf of and as president and agent of, and by procurement of, the aforesaid Brooklyn Cooperage Company, and the aforesaid Nathan Guilford, who was then and there and at all the times herein mentioned, acting for and on behalf of, and by procurement of, and as traffic manager and agent as aforesaid of the New York Central & Hudson River Railroad Company, entered into an unlawful agreement and arrangement, whereby it was agreed that the said Brooklyn Cooperage Company should and would ship barrel heads and staves, commonly known as cooperage material, over the aforesaid through line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York, and that the aforesaid common carriers should and would transport and cause to be transported such cooperage material over the aforesaid continuous line and route from the said city of Poplar Bluff to the said city of New York, and that the said Brooklyn Cooperage Company should and would pay and cause and procure to be paid to the aforesaid common carriers the lawful rates and charges named in the aforesaid tariff, that is to say, the sum of thirty-five cents for each one hundred pounds thereof so shipped and transported, and that thereafter the aforesaid New York Central & Hudson River Railroad Company should and would repay to the said Lowell M. Palmer, as agent of and acting on behalf of and for said Brooklyn Cooperage Company as aforesaid, the sum of five and four-fifths cents for each one hundred pounds of the said cooperage material so transported, in respect of such transportation of the same, and thereby reduce said lawful tariff of thirty-five cents for each one hundred pounds thereof so transported, in and by said amount, with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported.

That thereafter, and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of February in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one carload of the

aforesaid cooperage material, the same weighing thirty-seven thousand one hundred pounds, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York.

That the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter, under and pursuant to the aforesaid unlawful agreement and arrangement, and on the twenty-seventh day of August in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be
8 paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid carload of cooperage material, the sum of twenty-one dollars and fifty-two cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-seventh day of August, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to the said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

SECOND COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present that they here repeat and herein incorporate each, every and all of the allegations

stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter, and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of February, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, five hundred thousand eight hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-seventh day of August, in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the
9 said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of two hundred and ninety dollars and forty-six cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-seventh day of August, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to the said act to regulate

commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

THIRD COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

" with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of March, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and forty-six thousand one hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-seventh day of August, in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and
10 within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful

agreement and arrangement, the sum of eighty-four dollars and seventy-four cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-seventh day of August in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to the said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

FOURTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present that they here repeat and herein incorporate each, every and all the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of April, in the year of our Lord one thousand nine hundred and three (the exact dates being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and thirty-one thousand three hundred and fifty pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff

rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the sixteenth day of September in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority
11 as such agent and manager, at the Southern District of New York and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of seventy-six dollars and eighteen cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of September, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to the said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

FIFTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of May, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, two hundred and one thousand three hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company, and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the sixteenth day of September, in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said
12 Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of one hundred and sixteen dollars and seventy-five cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of September, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce, and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

SIXTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of June, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, two hundred and seventy-nine thousand seven hundred and fifty pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement to the aforesaid common carriers.

That thereafter and on the sixteenth day of November, in
13 the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of one hundred and sixty-two dollars and twenty-five cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner

and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of November, in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

SEVENTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of July, in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, sixty-one thousand pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the sixteenth day of November in the
14 year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as

such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of thirty-five dollars and thirty-eight cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of November in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

EIGHTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of July in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, two hundred and forty-

seven thousand pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a common management, arangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

15 That thereafter and on the sixteenth day of December in the year of our Lord one thousand nine hundred and three, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of one hundred and forty-three dollars and twenty-six cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said sixteenth day of December in the year of our Lord one thousand nine hundred and three, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

NINTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations

stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would b transported at a less rate than the lawful rate named in the tari aforesaid, to wit, at the rate of twenty-nine and one-fifth cents fo each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawfu agreement and arrangement, the aforesaid Brooklyn Cooperage Com pany, during the month of August in the year of our Lord one thou sand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missou Pacific Railway Company, at the aforesaid city of Poplar Bluff, fo shipment and transportation over the aforesaid continuous throug line and route to the aforesaid city of New York, two hundred an twenty-one thousand three hundred pounds of such cooperage mate rial, and the same was thereupon transported by the aforesaid Mi souri Pacific Railway Company and its aforesaid connecting commo carriers, over the aforesaid continuous line and route, under a com mon management, arrangement and control from the said city o Poplar Bluff to the said city of New York, and the lawful tari rate of thirty-five cents for each one hundred pounds thereo
16 according to the tariff aforesaid, was duly paid thereon, accord ing and pursuant to the aforesaid agreement, to the aforesai common carriers.

That thereafter and on the twenty-ninth day of January in the ye of our Lord one thousand nine hundred and four, the said New Yo Central & Hudson River Railroad Company, and the said Natha Guilford, agent and manager of said corporation common carrier a aforesaid, acting within the scope of his authority as such agent an manager, at the Southern District of New York, and within the juri diction of this court, paid and caused to be paid to the said Lowe M. Palmer, as agent of and for the benefit of the said Brookly Cooperage Company, by way of rebate and concession in respect o the transportation of the aforesaid shipment of cooperage materi under and pursuant to the aforesaid unlawful agreement and a rangement, the sum of one hundred and twenty-eight dollars an thirty-five cents, for and on account of such cooperage material act ally so shipped and transported as aforesaid over said continuo line and route, from the aforesaid city of Poplar Bluff to the afor said city of New York.

And so the jurors aforesaid on their oaths aforesaid, do say, th the said New York Central & Hudson River Railroad Compan corporation and common carrier as aforesaid, in manner and for and by the means aforesaid at and in the Southern District of Ne York, and within the jurisdiction of this court, on the said twent ninth day of January in the year of our Lord one thousand nine hu dred and four, unlawfully and wilfully did offer, grant and give rebate and concession in respect of the transportation of property

interstate commerce by a common carrier subject to said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto; against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

TENTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of September in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and sixty-seven thousand two hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common carriers, over the aforesaid continuous line and route, under a com-
17 mon management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-ninth day of January in the year of our Lord one thousand nine hundred and four, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage

material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of ninety-six dollars and ninety-seven cents, for and on account of such cooperage material, actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-ninth day of January in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

ELEVENTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage Company, during the month of December in the year of our Lord one thousand nine hundred and three (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and twenty-eight thousand three hundred pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri Pacific Railway Company and its aforesaid connecting common
18 carriers, over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful

tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-fifth day of May in the year of our Lord one thousand nine hundred and four, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of seventy-four dollars and forty-one cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-fifth day of May in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said act to regulate commerce and the acts amendatory and supplemental thereto whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

TWELFTH COUNT.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that they here repeat and herein incorporate each, every and all of the allegations stated and contained in the first count of this indictment down to and including the words

"with the result that such cooperage material should and would be transported at a less rate than the lawful rate named in the tariff aforesaid, to wit, at the rate of twenty-nine and one-fifth cents for each one hundred pounds thereof so transported."

That thereafter and under and pursuant to the aforesaid unlawful agreement and arrangement, the aforesaid Brooklyn Cooperage

Company, during the month of January in the year of our Lord one thousand nine hundred and four (the exact date being to the jurors unknown), delivered and caused to be delivered to the said Missouri Pacific Railway Company, at the aforesaid city of Poplar Bluff, for shipment and transportation over the aforesaid continuous through line and route to the aforesaid city of New York, one hundred and twenty-nine thousand pounds of such cooperage material, and the same was thereupon transported by the aforesaid Missouri
19 Pacific Railway Company and its aforesaid connecting common carriers over the aforesaid continuous line and route, under a common management, arrangement and control, from the said city of Poplar Bluff to the said city of New York, and the lawful tariff rate of thirty-five cents for each one hundred pounds thereof, according to the tariff aforesaid, was duly paid thereon, according and pursuant to the aforesaid agreement, to the aforesaid common carriers.

That thereafter and on the twenty-third day of September in the year of our Lord one thousand nine hundred and four, the said New York Central & Hudson River Railroad Company, and the said Nathan Guilford, agent and manager of said corporation common carrier as aforesaid, acting within the scope of his authority as such agent and manager, at the Southern District of New York, and within the jurisdiction of this court, paid and caused to be paid to the said Lowell M. Palmer, as agent of and for the benefit of the said Brooklyn Cooperage Company, by way of rebate and concession in respect of the transportation of the aforesaid shipment of cooperage material, under and pursuant to the aforesaid unlawful agreement and arrangement, the sum of seventy-four dollars and eighty-two cents, for and on account of such cooperage material actually so shipped and transported as aforesaid over said continuous line and route, from the aforesaid city of Poplar Bluff to the aforesaid city of New York.

And so the jurors aforesaid, on their oaths aforesaid, do say, that the said New York Central & Hudson River Railroad Company, corporation and common carrier as aforesaid, in manner and form, and by the means aforesaid, at and in the Southern District of New York, and within the jurisdiction of this court, on the said twenty-third day of September in the year of our Lord one thousand nine hundred and four, unlawfully and wilfully did offer, grant and give a rebate and concession in respect of the transportation of property in interstate commerce by a common carrier subject to said act to regulate commerce and the acts amendatory and supplemental thereto, whereby said property was transported by said corporation and common carrier as aforesaid at a less rate than that named in the tariffs aforesaid published and filed by such common carrier as required by said act to regulate commerce and the acts amendatory and supplemental thereto, against the peace of the United States and their dignity, and contrary to the statute in such case made and provided.

HENRY L. STIMSON,
United States Attorney.

20 (Endorsed: United States Circuit Court, Southern District of New York. United States of America against New York Central & Hudson River Railroad Company. Indictment. Offering, granting and giving a rebate. A true bill. John W. Lisson, foreman. Henry L. Stimson, United States attorney. Oct. 12, 1906, C. C. Paulding appears and pleads not guilty with leave to withdraw within 2 weeks, on behalf of deft. Oct. 26, 1906, Demurrer. Dec. 3, 1907, Opinion, Hough, J. Demurrer sustained. U. S. Circuit Court, Southern District of New York. Filed Aug. 10, 1906. John A. Shields, clerk.

21 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA *against* THE NEW YORK CENTRAL AND HUDSON River Railroad Company.	Indictment (twelve counts) for offering, granting, and giving rebates and concessions. Filed August 10, 1906.

The above-named defendant, appearing by Albert H. Harris, its attorney, says that indictment herein, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law, and that this defendant is not bound by the law of the land to answer the same; and this it is ready to verify.

And for specific and special causes of demurrer to the said indictment this defendant assigns the following objections thereto:

1. The acts described and set forth in the first count do not constitute a crime under the laws of the United States.

2. The acts described and set forth in the second count do not constitute a crime under the laws of the United States.

3. The acts described and set forth in the third count do not constitute a crime under the laws of the United States.

22 4. The acts described and set forth in the fourth count do not constitute a crime under the laws of the United States.

5. The acts described and set forth in the fifth count do not constitute a crime under the laws of the United States.

6. The acts described and set forth in the sixth count do not constitute a crime under the laws of the United States.

7. The acts described and set forth in the seventh count do not constitute a crime under the laws of the United States.

8. The acts described and set forth in the eighth count do not constitute a crime under the laws of the United States.

9. The acts described and set forth in the ninth count do not constitute a crime under the laws of the United States.

10. The acts described and set forth in the tenth count do not constitute a crime under the laws of the United States.

11. The acts described and set forth in the eleventh count do not constitute a crime under the laws of the United States.

12. The acts described and set forth in the twelfth count do not constitute a crime under the laws of the United States.

13. The allegations of the first count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

23 14. The allegations of the second count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

15. The allegations of the third count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

16. The allegations of the fourth count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

17. The allegations of the fifth count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

18. The allegations of the sixth count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

19. The allegations of the seventh count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

20. The allegations of the eighth count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

21. The allegations of the ninth count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

22. The allegations of the tenth count are so ambiguous and uncertain as to make it doubtful what offense is intended

24 to be thereby charged.

23. The allegations of the eleventh count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

24. The allegations of the twelfth count are so ambiguous and uncertain as to make it doubtful what offense is intended to be thereby charged.

25. The act of February 4, 1887, entitled "An act to regulate commerce," and the various acts amendatory thereof and supplemental thereto, including the act of February 19, 1903, entitled "An act to further regulate commerce with foreign nations and among the States," were enacted in excess of the power to regulate commerce with foreign nations and among the several States and with the Indian tribes, conferred upon the Congress by section 8 of Article I of the Constitution of the United States, and are unconstitutional and void in that the said statutes undertake to impose and prescribe unreasonable, unequal, and unjust regulations of interstate commerce; that is to say, the same subject common carriers engaged in the trans-

portation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, and arrangement for a continuous carriage or shipment from one State of the United States to another State, to rules, regulations, restrictions, pains, penalties, and forfeitures to which other common carriers engaged in competition with the carriers first mentioned in the transportation of passengers or property from one State to another wholly by water are not subjected.

26. The said statutes constitute unreasonable, unjust, and unequal regulations of interstate commerce, and are unconstitutional and void in so far as they undertake to punish this defendant criminally for acts done by its agents while acting within the scope of their employment, which if done by other persons acting within the scope of their employment as agents of corporations engaged in interstate commerce in competition with the defendant by means of the transportation of property from one State to another wholly by water, would be entirely innocent.

27. The said statutes are unconstitutional and void in that the same seek to deprive this defendant corporation of its property without due process of law in violation of Article V of the amendments to the Constitution of the United States, by subjecting it to the payment of a pecuniary fine for acts committed by its agents within the scope of their employment, in which acts this defendant did not and could not in any manner participate, thus imputing to the said corporation and punishing it criminally for acts which it did not and could not in fact commit.

28. The provision of section 1 of the act of February 19, 1903, that in construing and enforcing its provisions, the act of any agent employed by a carrier corporation, acting within the scope of his employment shall in every case be also deemed to be the act of such carrier, upon which provision the validity of this indictment wholly rests, so far as it relates to the defendant corporation, infringes the rights, privileges, and immunities of this defendant corporation under Article V of the amendments to the Constitution of the United States, by subjecting it to criminal punishment for the acts of its employees to which it was not and could not be a party or privy, thus depriving it of property without due process of law; and the said provision is therefore unconstitutional and void.

29. The Congress is without power, under the Constitution of the United States, to impute to this corporation the commission of a criminal offense and subject it to a criminal prosecution and punishment by reason of the matters described and set forth in the indictment.

30. The matters described and set forth in the indictment constitute but one transaction, and can not be severed or divided into separate transactions, or made the basis or subject of separate charges, or separately punished.

31. This defendant is incapable of committing the offense sought to be charged in the indictment.

32. This defendant is incapable of committing the offense sought to be charged in the first count of the indictment.

27 33. This defendant is incapable of committing the offense sought to be charged in the second count of the indictment.

34. The defendant is incapable of committing the offense sought to be charged in the third count of the indictment.

35. The defendant is incapable of committing the offense sought to be charged in the fourth count of the indictment.

36. The defendant is incapable of committing the offense sought to be charged in the fifth count of the indictment.

37. This defendant is incapable of committing the offense sought to be charged in the sixth count of the indictment.

38. This defendant is incapable of committing the offense sought to be charged in the seventh count of the indictment.

39. This defendant is incapable of committing the offense sought to be charged in the eighth count of the indictment.

40. This defendant is incapable of committing the offense sought to be charged in the ninth count of the indictment.

41. This defendant is incapable of committing the offense sought to be charged in the tenth count of the indictment.

28 42. This defendant is incapable of committing the offense sought to be charged in the eleventh count of the indictment.

43. This defendant is incapable of committing the offense sought to be charged in the twelfth count of the indictment.

Wherefor, for want of sufficient indictment in this behalf, this defendant prays judgment and that by the court it may be dismissed and discharged from the said premises in the said indictment specified.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.
By D. W. PARDEE, *Secretary.*

UNITED STATES OF AMERICA,
Southern District of New York, ss.:

Dwight W. Pardee, being duly sworn, deposes and says that he is secretary of the New York Central and Hudson River Railroad Company, one of the defendants above named, that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact, as he is advised by counsel and verily believes.

D. W. PARDEE.

Subscribed and sworn to before me this 25th day of October, 1906.

ALBERT B. QUENCER,
[SEAL.] *Notary Public, N. Y. Co., N. Y., No. 1.*

29 We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

ALBERT H. HARRIS,
JOHN D. LINDSAY,
AUSTEN G. FOX,
Of counsel for the said The New York Central and Hudson River Railroad Company.

(Endorsed:) Circuit Court of the U. S., So. Dist. of New York. The United States of America, plaintiff, against The New York Central & Hudson River Railroad Company, defendant. Demurrer. Albert H. Harris, attorney for defendant, 417 Grand Central Station, Borough of Manhattan, New York City. To Henry L. Stimson, esq., U. S. attorney, attorney for plaintiff. U. S. Circuit Court, Southern District of New York. Filed Oct. 26, 1906. John A. Shields, clerk.

30 At a stated term of the Circuit Court of the United States for the Southern District of New York in the Second Circuit, begun and holden at the United States courts and post-office buildings in the borough of Manhattan of the city of New York, on the 9th day of October, 1907, and thence by due adjournments continued to and including this 27th day of January, 1908.

Present: The Honorable Charles M. Hough, district judge.

UNITED STATES OF AMERICA *against* THE NEW YORK CENTRAL AND HUDSON RIVER Railroad Company.	On indictment for giving rebate, &c. (Filed August 10, 1906.)

Defendant having on the 21st day of November, 1907, upon the argument of the demurrer herein, moved for leave to amend the same by assigning therein certain further, specific, and special causes of demurrer, and the court having, upon the consent in open court of the United States attorney, thereupon granted the said motion and decided and directed that the said demurrer be amended by assigning therein the following additional objections to the indictment:

44. The acts described and set forth in the indictment do not constitute a crime in that it is not alleged in any of the counts that the sum charged to have been paid by way of rebate and concession was paid unlawfully, or with criminal intent, or with the intent thereby to offer, grant, or give any rebate, concession or discrimination, or that thereby any rebate, concession or discrimination was offered, granted or given.

45. The acts described and set forth in the indictment do not constitute a crime in that it is not in any of the counts alleged that by reason of the matters therein set forth and described any property was transported in interstate or foreign commerce by the

defendant as a common carrier at a less rate than that named in any tariff published and filed by the defendant as required by the said act to regulate commerce and the acts amendatory thereto, or that thereby any other advantage was given or discrimination was practiced.

46. The acts described and set forth in the first and second counts do not constitute a crime, in that it does not appear therefrom that the property in respect of the transportation of which the sums
31 therein mentioned were paid was transported after the going into effect of the act of February 19, 1903.

47. The Congress was without power under the Constitution of the United States to subject this defendant to punishment by the said act of February 19, 1903, for offering, giving or granting rebates, concessions or discriminations in respect of the transportation of the property mentioned in the first and second counts it not appearing that the same, or any part thereof was transported after the going into effect of the said act and such transportation having presumably constituted completed transactions in interstate commerce prior to its taking effect.

48. The Congress was without power under the Constitution of the United States after the completion of the transactions in interstate commerce alleged in the first and second counts to legislate by the said act in respect to or otherwise deal with the matters which are therein alleged to have subsequently taken place.

49. The provisions of the act of February 19, 1903, upon which this indictment is based, were in conflict with the provisions on the same subject of the act of June 29, 1906, entitled "An act to amend an act entitled 'An act to regulate commerce' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," and were expressly repealed by the said last-mentioned act; and since this cause was not pending at the time the said last-mentioned act took effect, this defendant can not now be prosecuted or punished by reason of the premises specified in the indictment.

And it now appearing that no formal order has at any time been entered upon the said decision, it is

Ordered that the demurrer herein be and the same hereby is amended nunc pro tunc as of the said 21st day of November, 1907, in accordance with the said decision, that is to say, by assigning therein as further, specific, and special causes of demurrer the additional objections to the indictment hereinabove set forth.

Enter.

C. M. HOUGH,
United States District Judge.

We hereby consent to the entry of the foregoing.

HENRY L. STIMSON,
United States Attorney.
A. H. HARRIS,
Attorney for Defendant.

32 (Endorsed:) U. S. Circuit Court, Southern District of New York. United States of America, plaintiff, against The New York Central & Hudson River Railroad Company. Order and consent. Albert H. Harris, attorney for defendant, 417 Grand Central Station, Borough of Manhattan, New York City. U. S. Circuit Court, Southern District of N. Y. Filed Jan. 27, 1908. John A. Shields, clerk.

33 At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States court rooms in the borough of Manhattan, in the city of New York, on Thursday, the 21st day of November, in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable E. Henry Lacombe, circuit judge.

UNITED STATES
v.
NEW YORK CENTRAL & HUDSON RIVER Railroad Company. } E. 4337.

On motion of U. S. attorney, ordered argument of demurrer.

Henry L. Stimson, U. S. attorney, heard for Government; Austen G. Fox heard for defendant; John D. Lindsay heard for defendant. John D. Lindsay heard for defendant.

C. A. V.

34 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
NEW YORK CENTRAL & HUDSON RIVER Railroad.

On demurrer to indictment for granting rebates in violation of the provisions of the "Elkins Act."

Austen G. Fox, John D. Lindsay, and Albert H. Harris for demurrer; Henry L. Stimson, U. S. attorney, and Henry A. Wise, assistant U. S. attorney, opposed.

HOUGH, D. J.

The substantial offence charged in the indictment is that pursuant to agreement made in 1898, between a duly accredited agent of the defendant and a similarly accredited agent of the Brooklyn Cooperage Company, certain goods were transported in 1903 from Poplar Bluffs, Iowa, to New York City, at less than the tariff rates, such result being accomplished by an agreement for rebates from the legal tariff, which rebates were paid by the defendant in 1903 and 1904.

The goods in question were transported over the lines of several railroads, of which the Missouri-Pacific Railway Company was the initial carrier and the defendant the delivering carrier.

After alleging the existence of this transportation arrange-
35 ment the indictment states that the "Missouri Pacific Railway Company filed with the Interstate Commerce Commission as required by law, and had published in accordance with the directions of the Interstate Commerce Commission as provided by law, a joint tariff of rates, fares, and charges," i. e., the tariff alleged to have been violated by defendant's act in paying the rebates above referred to.

This is the only allegation of the filing or publication of the violated tariff, and it is necessarily inferable therefrom that the defendant never either filed or published the same, although it did participate in the transportation, in the emoluments flowing therefrom, and was the active member of the railroad partnership in the alleged violation of the law.

The substantial ground of demurrer is that because the New York Central road did not either file or publish this tariff it committed no offence against the statute by paying the rebate agreed upon.

The first section of the Elkins Act under which this indictment is brought clearly sets forth two entirely separate offences. The first is a wilful failure to "file and publish the tariffs" or "strictly to observe the same," as required by the interstate commerce act, and the second is ("upon the part of any carrier subject to" the interstate commerce act) "to offer, grant, or give * * * any rebate * * * in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall * * * be transported at a less rate than that named in the tariffs published and filed by such carrier as required by" the interstate commerce act.

In respect of this second offence, the statute is specific that
36 "every * * * corporation" which shall "give * * * any such rebates * * * shall be deemed guilty of a misdemeanor;" and it is with this misdemeanor defendant is charged.

The last portion of the first section of the statute declares that "whenever any carrier files * * * or publishes a particular rate under the provisions of the" interstate commerce act, or "participates in any rates so filed or published, that rate as against such carrier * * * in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate * * * shall be deemed to be an offence under this section of this act."

The last quotation is no more than a statutory rule of evidence, and does not create any offence new or different from those specifically described and proscribed in the earlier portions of the section. This is, I think, the view taken in United States vs. Camden Iron Works (150 U. S., at 218).

It follows that participation in the rate filed and or published by the Missouri-Pacific Railway would furnish a conclusive presumption

against this defendant, were the indictment based upon an alleged failure either to file the tariff or "strictly to observe" the same. But it does not follow that participation in a filed or published rate renders the participator liable to indictment for the second offence proscribed by the statute, where the rate violated had been neither filed nor published by the person or corporation proceeded against.

The giving of a rebate was only rendered a crime by the statute, which, in my opinion, limits the offence by plain words, to the giving of rebates "whereby any such property (i. e., property in
37 interstate transit) shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier." The words "such carrier" can only refer to the carrier proceeded against, and unless that carrier filed or published the violated tariff the statute affords no remedy by indictment for the second offence enumerated.

Whether publication without filing would furnish a lawful basis for prosecution need not be considered, as this indictment is specific that both filing and publication were done by the Missouri Pacific Railway only.

Demurrer sustained.

C. M. HOUGH, *D. J.*

Dec. 3, 1907.

(Endorsed:) United States Circuit Court, Southern District of N. Y. Opinion. Hough, D. J. Dec. 3, 1907. U. S. Circuit Court, Southern District of N. Y. Filed Dec. 3, 1907. John A. Shields, clerk.

38 Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA
vs.
NEW YORK CENTRAL & HUDSON RIVER Railroad Company.

Reargument on demurrer to indictment; original opinion filed December 3, 1907.

MEMORANDUM.

That the construction given the first section of the Elkins Act in my opinion of December 3d, is the plain and simple meaning of the words used, still seems to me clear.

The usage of the Interstate Commerce Commission, and any latitude of construction in civil actions, should not avail in construing an indictment for crime.

Nor am I able to perceive that the interpretation given on December 3d is at variance with anything decided in the Reichman case in

145 F. R., at 235, nor the Chicago, Burlington & Quincy R. R. case in the Eighth Circuit.

The latter case is one of a carrier which filed its own tariff, and then took goods for transportation under "certain tariffs * * * and joint * * * tariffs," i. e., its own charges and the joint charge of its connections. All the tariffs being filed, and the act of transporting the goods having made the aggregate of the tariffs the legal rate, the act of the Burlington in granting a concession was a rebate from the through rate of which its own filed tariff was a part.

39 I find nothing in that indictment or opinion ruling the present cause.

It still seems to me plain that this contention revolves around the meaning of the last portion of the first section of the act.

The New York Central did participate in a filed and published rate, and it did depart from such rate, and such departure "shall be deemed to be an offence under this section of this act," but what offence, and which offence? Certainly an offence for which both definition and punishment can be found in the same first section; and unless both definition and punishment can be so found, the words create an illegality, without any sanction.

It was said to a jury in the Wood case (145 F. R., at 409) that it "may be unlawful for a carrier to give a rebate * * * on a joint tariff in which it participated when published by another." Be it so, but that is not the same thing as declaring the act a misdemeanor, and if the court in that case considered that an act unlawful under section one was necessarily indictable under the same section, I respectfully differ.

This indictment might be reduced to its lowest terms thus, (a) the Missouri Pacific Railway published and filed a through rate, (b) the New York Central participated therein, and (c) departed therefrom, contrary to the form of the last part of the first section of the Elkins Act, therefore (d) it committed the second offence denounced in the first part of the same section.

I believe this a non sequitur, and adhere to the decision filed.

C. M. Hough, *D. J.*

Dec. 31, 1907.

40 (Endorsed:) United States Circuit Court, Southern District of N. Y. United States of America v. New York Central & Hudson River Railroad Co. Memorandum. Hough, D. J., Dec. 31, 1907. U. S. Circuit Court, Southern District of N. Y. Filed Dec. 31, 1907. John A. Shields, clerk.

41 At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, for the trial of criminal causes, held at the United

States court rooms, in the borough of Manhattan, city of New York, on the 4th day of January, 1908.

Present: Hon. Charles M. Hough, United States District Judge.

THE UNITED STATES OF AMERICA
vs.
THE NEW YORK CENTRAL AND HUDSON RIVER RAIL ROAD COMPANY.

This cause having been duly brought on for argument upon the demurrer of the above named defendant to the indictment herein, and having been argued pro and con by counsel for the respective parties on the 21st day of November, 1907, and an opinion having thereafter been rendered, to wit, on the 3d day of December, 1907, sustaining said demurrer, and the attorney for the United States having thereafter made a motion for a reargument, and said motion for a reargument having duly come on to be heard on the 20th day of December, 1907, and said motion for reargument having thereupon been granted and a reargument having thereupon been had and having been argued pro and con by counsel for the respective parties upon said day, and the court having thereafter, and on the 31st day of December, 1907, filed an opinion herein sustaining the demurrer to the indictment herein, and all and singular the premises being seen and by the court here now fully understood, and due deliberation having been thereupon had, and it appearing to the court that the said indictment and the matters therein contained, as the same are therein stated and set forth, are not sufficient in law, and that
42 the said The New York Central & Hudson River Rail Road Company is not bound by the law of the land to answer the same for the reason, among others, given in the aforesaid written opinions filed herein in the office of the clerk of this court on the 3d and 31st days of December, 1907, therefore it is

Considered and adjudged that the said demurrer be and the same hereby is sustained and allowed, and that the said defendant The New York Central & Hudson River Rail Road Company be and it hereby is dismissed and discharged from the premises in the said indictment specified.

C. M. HOUGH,
United States District Judge.

(Endorsed:) U. S. Circuit Court. The United States of America versus The New York Central & Hudson River Railroad Company. Order and notice of settlement. Henry L. Syimson, United States attorney. Copy of the within paper received this 2d day of Jan., 1908, Albert H. Harris, attorney for defendant. U. S. Circuit Court, Southern District of N. Y. Filed, Jan. 4, 1908. John A. Shields, clerk.

43 United States Circuit Court for the Southern District of New York in the Second Circuit.

THE UNITED STATES OF AMERICA
vs.
THE NEW YORK CENTRAL & HUDSON RIVER Rail Road Company.

An indictment against The New York Central and Hudson River Railroad Company, the defendant above named, having been found and filed by the grand jurors of the United States in and for the Southern District of New York, in the office of the clerk of the United States Circuit Court for the Southern District of New York, on the 10th day of August, 1906, and thereafter the defendant having been arraigned thereon, and having interposed a demurrer to said indictment, and the issues raised by said demurrer having been duly argued, and an order having thereafter been entered, to wit, upon the 4th day of January, 1908, sustaining said demurrer,

Now on motion of Albert H. Harris, esquire, attorney for the defendant, it is

Ordered and adjudged that the said demurrer be and the same hereby is sustained and that the said indictment be and the same hereby is dismissed.

Judgment entered this 22nd day of January, 1908.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

The entry of the above judgment is hereby consented to.

ALBERT H. HARRIS,
Attorney for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District of New York. The United States of America vs. The New York Central & Hudson River Railroad Company. Judgment. Henry L. Stimson, United States attorney, attorney for U. S. U. S. Circuit Court, Southern District of N. Y. Filed Jan. 22, 1908. John A. Shields, clerk.

44 United States Circuit Court for the Southern District of New York in the Second Circuit.

THE UNITED STATES OF AMERICA
vs.
THE NEW YORK CENTRAL & HUDSON RIVER Railroad Company, defendant.

Assignment of errors.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors which it

avers occurred in the decision of the court herein sustaining the demurrer to the indictment herein, to wit:

1. The court erred in sustaining the demurrer to the indictment herein.

2. The court erred in not overruling the demurrer to the indictment herein.

3. The court erred in holding as matter of law that the indictment herein was insufficient in law.

4. The court erred in not holding that the indictment herein sufficiently charges an offense by the defendant in violation of the laws of the United States.

5. The court erred in entering the order herein on the fourth day of January, 1908, sustaining the demurrer to the indictment herein.

6. The court erred in its decision herein in its construction of section 1 of the act of Congress known as "An act to further regulate commerce with foreign nations and among the States" (act of Congress approved February 19, 1903) in that the court held as a matter of law that a common carrier jointly engaged in transporting freight for hire over a continuous railroad route or line, operated jointly by several common carriers, from a point in one State to a point in another State, can not be punished for giving a rebate in respect of property transported by it over such route or line unless the carrier so giving such rebate had filed with the Interstate Commerce Commission a schedule of rates and fares to be charged by it in respect of such transportation.

7. The court erred in holding as a matter of law that where such railroad corporation, common carrier, accepts and receives for transportation and transports property in interstate commerce upon through billing, and participates in a tariff filed by any railroad company, common carrier, also engaged in such transportation, that it is not a punishable offence for such common carrier so participating in such tariff, to pay back to the shipper of such property any part of the money paid by such shipper for such transportation, as a result of which repayment such property is transported at a rate less than that mentioned and set forth in such tariff.

8. The court erred in not holding as a matter of law that where a railroad company, common carrier, together with other railroad companies, common carriers, jointly establish a continuous through line and route for the transportation of passengers and property, for hire, from a point in one State to a point in another State over their respective lines, and one of such carriers thereupon establishes and files with the Interstate Commerce Commission a joint tariff of rates, fares and charges to be demanded and collected from shippers for the transportation of property between said points over said continuous through line and route, and thereupon property is received from a shipper and transported over said through line or route between said points, and the rate mentioned in such tariff so

established and filed is paid to such carriers for such trans-
46 portation, it is a punishable offence against the laws of the United States for any of the carriers parties to said joint through route, and participating in the transportation of said property is transported at a rate less than that mentioned in the tariff so established and filed as aforesaid.

9. The court erred in not holding as a matter of law that if a railroad company, common carrier, engaged in interstate commerce establishes a tariff and files the same with the Interstate Commerce Commission, that it is unlawful for any person or corporation, whether such person or corporation be the carrier filing such tariff or not, to pay to the shipper any part of the lawful tariff rate paid for transportation of property in interstate commerce whereby such shipper shall succeed in having its property transported at a rate less than that mentioned in the tariff so established and filed.

10. The court erred in not holding as a matter of law that if a through route between points in two different States is made up of the connecting roads of several railroad companies, and one of said railroad companies establishes and files with the Interstate Commerce Commission a tariff of rates and fares to be demanded and collected for the transportation over said through route and thereupon property is transported over said through route on through billing, and the charges therefor are paid upon the basis of such tariff so filed, that it is a punishable offence against the laws of the United States for any of the railroad companies making up such through route, whether it filed any tariff or not, to refund to the shipper any part of the tariff rate so paid for such transportation of property over such route.

11. The court erred in not holding as a matter of law that if
47 a through route between points in two different States is made up of the connecting roads of several railroad companies, and one of said railroad companies establishes and files with the Interstate Commerce Commission a joint tariff of rates and fares to be demanded and collected for the transportation of property between said points over said through route, and thereupon property is received and transported between said points over said through route on through billing, and the shipper pays therefor upon the basis of such joint tariff so established and filed, and the several railroad companies, common carriers, making up said continuous through route handles said property upon such through billing and divide the monies so paid for such service among them, that such sum so paid and divided is the lawful rate for such service, and it is unlawful for any of said railroad companies, whether it filed any such tariff or not, to refund or repay to the shipper of such merchandise any part of said monies so paid, whereby it results that such property is transported at a rate less than that named in such tariff, and any such carrier making such payment is guilty of a punishable offence against the laws of the United States.

And the United States aforesaid, plaintiff in error, prays that the order aforesaid for the errors aforesaid and other errors in the record and proceedings herein may be reversed and all together held for nothing, and that the plaintiff in error may be restored to all things which it has lost by reason of said order, and that the Circuit Court be directed to vacate and set aside said order and to compel the defendant, the defendant in error, to plead to the indictment herein.

Dated, New York, January 21st, 1908.

HENRY L. STIMSON,
United States Attorney for the Southern District of New York.

48 (Endorsed:) U. S. Circuit Court, Southern District of New York. The United States of America vs. The New York Central & Hudson River Railroad Company. Assignment of errors. Henry L. Stimson, United States attorney, attorney for U. S. U. S. Circuit Court, Southern District of N. Y. Filed Jan. 22, 1908. John A. Shields, clerk.

49 *By the Honorable E. Henry Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to The New York Central and Hudson River Rail Road Company greeting:*

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol, in the city of Washington, in the District of Columbia, on the 19th day of February, A. D. 1908 pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein The United States of America is appellant and you are appellee, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 22nd day of January, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

E. H. LACOMBE,
Judge of the Circuit Court of the United States
for the Southern District of New York,
in the Second Circuit.

50 (Indorsed:) U. S. Circuit Court, Southern District of New York. The United States of America versus The New York Central and Hudson River Rail Road Company. Citation. Henry L. Stimson, United States attorney, attorney for U. S. Service of a

copy of the within is hereby admitted. New York, January 24, 1908. Albert H. Harris, attorney for deft. U. S. Circuit Court, Southern District, N. Y. Filed Jan. 25, 1908. John A. Shields, clerk.

51 (Indorsed:) Supreme Court of the United States. The United States of America v. The New York Central and Hudson River Railroad Company. Transcript of Record.

(Indorsement on cover:) File No. 21,027. S. New York, C. C. U. S. Term No. 624. The United States, plaintiff in error, vs. The New York Central & Hudson River Railroad Company. Filed February 19th, 1908. File No. 21,027.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.
} No. 624.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the United States, respectfully moves the court to advance the above-entitled cause for hearing at an early day convenient to the court during the October term, 1908.

The defendant in error was indicted on August 10, 1906, for a violation of the act of February 19, 1903 (32 Stat., 847), commonly called the "Elkins Act." The indictment, which was based on the first section of that act, contained 12 counts, and charged the giving, etc., of rebates, in pursuance of an unlawful agreement, to the Brooklyn Cooperage Company on as many separate and distinct shipments of freight transported from Poplar Bluff, Mo., to New York, N. Y., the Missouri Pacific Railway Company being the initial carrier and the defendant company the delivering carrier.

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The indictment alleged that the several railroad lines over which the shipments were transported "had jointly established and the said Missouri Pacific Railway Company had filed with the Interstate Commerce Commission as required by law, and had published in accordance with the directions of the Interstate Commerce Commission as provided by law, a joint tariff of rates," etc., "for the transportation of property in interstate commerce * * *," and that the defendant in error unlawfully and willfully offered and gave rebates "in respect of the transportation of the property," etc.

The defendant in error demurred to the indictment, assigning as grounds of demurrer the following:

(1) That the acts charged did not constitute a crime under the laws of the United States; (2) that the ambiguity and uncertainty of the allegations made it doubtful as to what offenses were intended to be charged; (3) that the act upon which the indictment is based is unconstitutional; (4) that the offenses charged constitute but one transaction and cannot be divided into separate transactions, or separately punished; (5) that the defendant is incapable of committing the offenses charged; and (6) that the act of June 29, 1906, repealed the act upon which the indictment is based.

The demurrer was sustained principally on the ground that since the defendant company did not

file or publish the tariff it committed no offense by paying the rebate agreed upon.

A writ of error was sued out by the Government under the act of March 2, 1907 (34 Stat., 1246), which provides for the taking of a writ of error from the district or circuit courts direct to this court in all criminal cases in certain instances.

This motion is submitted for the following reasons:

The question involved is of public importance; the case is a criminal one and is therefore entitled to advancement under rule 26, section 3; and provision is made by the act of March 2, 1907, that writs of error in cases under it "shall be diligently prosecuted and shall have precedence over all other cases."

Notice of this motion has been served upon opposing counsel.

HENRY M. HOYT,
Solicitor-General.

APRIL, 1908.

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